Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1976

No. 76-1224

A. STUCKI COMPANY, a corporation,
Plaintiff-Petitioner,

v.

RAILROAD DYNAMICS, INC., a corporation,
Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respectfully submitted,

RAYMOND G. HASLEY
Ninth Floor, Oliver Building
Pittsburgh, Pennsylvania 15222
Counsel for Petitioner,
A. Stucki Company

Of Counsel:

JOHN H. RIORDAN, JR.
and
ROSE, SCHMIDT AND DIXON
Ninth Floor Oliver Building
Pittsburgh, Pennsylvania 15222

Financial Press Corporation, Pittsburgh

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The Petitioner, A. Stucki Company, respectfully prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered in this case on December 7, 1976.

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit, filed on December 7, 1976 and unreported, is reprinted in the Appendix hereto at 1a.

The Memorandum opinion and Order of Court of the United States District Court for the Western District of Pennsylvania, filed February 19, 1976 and unreported is reprinted in the Appendix hereto beginning at 2a.

STATEMENT OF JURISDICTION OF THIS COURT

The Judgment Order of the United States Court of Appeals for the Third Circuit which Petitioner requests this Court review was entered on December 7, 1976. No Petition for Rehearing of that Judgment Order was filed. The jurisdiction of this Court to review the aforesaid Judgment Order by Writ of Certiorari is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

For the purpose of determining venue in a patent infringement action in accordance with 28 U.S.C. §1400(b), does a defendant corporation "reside" in all of the federal judicial districts of the state of its incorporation?

Specifically, does a Pennsylvania corporation having its corporate offices in the Eastern District of Pennsylvania reside, under 28 U.S.C. §1400(b), in the Western District of Pennsylvania when such corporation is committing acts of infringement in the Western District of Pennsylvania?

Statutes Involved &
Statement of the Case

STATUTES INVOLVED

28 U.S.C. §1391(c):

A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

28 U.S.C. §1400(b):

Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

STATEMENT OF THE CASE

This is an action for injunctive and monetary relief under the patent laws of the United States, 35 U.S.C. §1 *et seq*, for infringement of a patent owned by Petitioner herein (plaintiff below). Jurisdiction of the District Court was invoked under Sections 1331, 1332 and 1338 of Title 28 of the United States Code.

Petitioner is a Pennsylvania corporation with its principal place of business in Allegheny County, Pennsylvania, within the Western Judicial District of Pennsyvlania, and is the owner of United States Letters Patent No. 3,837,292 granted September 24, 1974, for a device indentified in the patent and railroad inudstry as a "Hydraulic Truck Snubber". In non-technical terms, Petitioner's patent relates to a hydraulic-mechanical device for use on railroad freight cars. On the typical freight car, a "Hydraulic Truck Snubber" is installed in each spring group on the four corners of the freight car in the truck assemblies to minimize the effect of excessive rocking or lateral

instability of a traveling freight car. Petitioner sells its hydraulic snubbers to railroad car builders who utilize the device in manufacturing new freight cars.

Respondent is also a Pennsylvania corporation, and has its principal place of business in the Eastern Judicial District of Pennsylvania. Respondent conducts business within the Western District from its office in the Eastern District. Since approximately 1973, Respondent has manufactured and sold a competing hydraulic snubber device which it has identified as the "D-5 Snubber". Although, to Petitioner's knowledge, Respondent has no regular and established place of business within the Western Judicial District of Pennsylvania, it is doing business in that District and has sold or agreed to sell to at least two railroad car builders a minimum of 16,500 of its infringing D-5 Snubbers. Sales of the D-5 Snubbers by Respondent to Bethlehem Steel Corporation ("Bethlehem") and Pullman-Standard Division of Pullman, Inc., both located in the Western District, have been in the sum of at least $1,640,000. Respondent, as part of its contracts of sale with the aforesaid car builders, has assumed liability and costs for patent infringement suits against these car builders.

Petitioner filed this patent infringement action in the United States District Court for the Western District of Pennsylvania on April 21, 1975. On May 9, 1975 Respondent filed a motion to dismiss this case under F.R.Civ.P. 12(b)(3) for improper venue on the grounds that it did not "reside" in the Western Judicial District of Pennsylvania and, as it had no regular and established place of business in that District — although admittedly conducting business there from its office in the eastern part of the state — venue was improper under 28 U.S.C. §1400(b). The District Court granted Respondent's motion by its Order dated February 19, 1976.

In its Memorandum opinion issued the same day, the District Court explained its decision. The Court stated at 3a:

> "With regard to the first test [the first of the two alternative bases for venue under Section 1400(b)] plaintiff contends that venue is proper because defendant resides in this judicial district. *The fundamental flaw in this contention is that it presupposes that the residence of a corporation, in the context of* §1400(b), *is its state of incorporation*. Thus, the argument extends that defendant resides in all three of Pennsylvania's federal judicial districts. The Court does not agree." (Emphasis additional)

The Court refused to consider cases cited by Petitioner construing similar language appearing in 28 U.S.C. §1391(c) which held that for purposes of that Section a corporation is considered to reside in all judicial districts of its state of incorporation.

On February 24, 1976, Petitioner filed its Notice of Appeal from the final Order of the District Court to the United States Court of Appeals for the Third Circuit. The Third Circuit affirmed the District Court by a Judgment Order dated December 7, 1976. Prior to the District Court's dismissal of this case on February 19, 1976, no suits had been commenced by Petitioner against Respondent's customers, even though Petitioner had a right to do so. After this case was dismissed by the District Court, however, Petitioner promptly instituted an infringement action against Bethlehem in the Western District of Pennsylvania at Civil Action No. 76-247. Bethlehem was one of the customers of Respondent who was incorporating infringing D-5 Snubbers in the construction of new freight cars and was a direct infringer within the jurisdiction of 35 U.S.C. §271(a).

On March 17, 1976, after Petitioner had commenced its infringement action against Bethlehem, Respondent commenced an action for a declaratory judgment against Petitioner in the United States District Court for the Eastern

District of Pennsylvania. Respondent's Complaint, *inter alia*, sought an Order that Petitioner's patent was invalid and that the patent was not infringed by Respondent's D-5 Snubber.

On May 7, 1976, at the motion of Bethlehem, the District Court in the Western District of Pennsylvania stayed proceedings in Civil Action No. 76-247 until entry of final judgments in this action and in Respondent's later filed declaratory judgment action in the Eastern District of Pennsylvania.

REASONS FOR GRANTING THE WRIT

I. REVIEW OF THE DECISION BELOW BY THIS HONORABLE COURT IS NECESSARY BECAUSE THAT DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER FEDERAL COURTS REGARDING WHETHER A CORPORATION IS A RESIDENT OF ITS ENTIRE STATE OF INCORPORATION FOR PURPOSES OF SECTION 1400(b).

The specific conflict between the Lower Court's[1] decision and prior opinions of this Court results from the Lower Court's determination of where a corporation "resides" for the purposes of Section 1400(b). This Court has stated that a corporate infringer "resides" in its state of incorporation for the purposes of Section 1400(b). *Fourco Glass Company v. Transmirra Products Corporation*, 353 U.S. 222, 1 L.Ed.2d 786, 77 S.Ct. 787 (1957); *Brunette Machine Works, Ltd. v. Kockum Industries, Inc.*, 406 U.S.

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[1]In affirming the District Court, the Court of Appeals did not issue an opinion explaining the basis for its action. Petitioner has assumed herein that the Court of Appeals based its affirmance on the District Court's Memorandum opinion; hence, Petitioner will treat the District Court's decision and Memorandum opinion as if it had been adopted by the Court of Appeals, and will refer to the District Court and the Court of Appeals collectively as the "Lower Court" or the "Court below".

706, 32 L.Ed.2d 428, 92 S.Ct. 1936 (1972). Likewise, there are so many decisions from other federal courts holding that the residence of a corporate defendant is its state of incorporation for the purposes of determining venue in patent infringement actions that the point may almost be said to be beyond dispute. See, for example, *Air Factors, Inc. v. Tempmaster Corp.*, 363 F. Supp. 93 (E.D. Wis. 1973); *Sterling Manufacturing Co. v. Radio Shack*, 364 F. Supp. 1068 (N.D. Ohio 1973); *Aetna Cas. & Sur. Co. v. Singer-General Precision, Inc.*, 323 F. Supp. 1141 (D. Del. 1971); *Devex Corp. v. General Motors Corp.*, 263 F. Supp. 17 (D. Del. 1967).

Despite this clear authority to the contrary, the Court below nonetheless ruled that the residence of a corporate defendant is something less than the entire state of its incorporation.[2] The Court stated in its Memorandum opinion at 3a:

> "With regard to the first test [the first of the two alternative bases for venue under Section 1400(b)] plaintiff contends that venue is proper because defendant resides in this judicial district. *The fundamental flaw in this contention is that it presupposes that the residence of a corporation, in the context of §1400(b), is its state of incorporation.* Thus, the argument extends that defendant resides in all three of Pennsylvania's federal judicial districts. The Court does not agree." (Emphasis additional)

The above-quoted language represents a distinct conflict with the prior statements of this Court in *Fourco Glass*

[2]The same error was made by the Court in *Hydro-Clear Corporation v. Aer-O-Flo Corporation*, 317 F. Supp. 1317 (N.D. Ohio 1970), a case relied upon by the District Court, where the Court held that an alleged corporate infringer is a resident of the district in which it has its principal office as designated in its articles of incorporation.

Company and *Brunette Machine Works, Ltd., supra.* In *Fourco Glass Company*, this Court, in considering the Revisers' Notes for the 1948 amendments to Section 1400(b), stated at 353 U.S. 226:

> "[W]e pause here to observe that this treatment, and the expressed reason for it, seems to negative any intention to make corporations suable, in patent infringement cases, where they are merely 'doing business' because those synonymous words ["inhabitant" and "resident"] mean domicile, and, in respect of corporations, mean the state of incorporation only." (citation omitted) (emphasis additional)

Likewise, in *Brunette Machine Works, Ltd.*, this Court stated at 406 U.S. 707, n. 2:

> "Petitioner does not 'reside' in Oregon, because the residence of a corporation for purposes of §1400(b) is its place of incorporation". (citation omitted)

II. REVIEW OF THE DECISION BELOW BY THIS HONORABLE COURT IS NECESSARY TO PREVENT CONFLICT WITH THE INTERPRETATION GIVEN BY THE FEDERAL COURTS TO SIMILAR LANGUAGE APPEARING IN ANOTHER FEDERAL VENUE STATUTE.

The question of whether a corporate defendant "resides" in each and every judicial district of its state of incorporation for the purposes of venue under Section 1400(b) is an issue critical to the proper implementation of the policies underlying federal patent legislation. This question is apparently a matter of first impression in this Court and in the federal appellate courts, as Petitioner is unable to find a reported decision considering this problem. Since there is an absence of controlling authority on point, Petitioner submits that the Lower Court herein should have relied upon decisions of other federal courts interpreting similar language appearing in 28 U.S.C. §1391(c), the

general federal venue provision, in construing Section 1400(b). The Lower Court refused to do this, with the result that its decision creates needless conflict with those cases interpreting similar language in Section 1391(c).

Section 1391(c) provides, in relevant part, that "a corporation may be sued in any judicial district in which it is incorporated". Section 1400(b) provides that a patent infringer may be sued in the "judicial district where the defendant resides". Given this similarity of language, and in the absence of clear Congressional intent to the contrary, Petitioner submits that the Lower Court, in the absence of any appellate authority, should have turned to decisions of other federal courts which considered whether a corporation resides in *every* judicial district of the state of its incorporation or in only a particular judicial district of that state.

The sizeable majority of decisions construing Section 1391(c) have concluded that a corporation resides in every judicial district of its state of incorporation so that venue is proper over a corporate defendant in *any* federal judicial district. *Johnstone v. York County Gas Company*, 193 F. Supp. 709 (E.D. Pa. 1961); *Minter v. Fowler & Williams, Inc.*, 194 F. Supp. 660 (E.D. Pa. 1961); *DeGeorge v. Mandata Poultry Company*, 196 F. Supp. 192 (E.D. Pa. 1961); *Junior Spice, Inc. v. Turbotville Dress, Inc.*, 339 F. Supp. 1189 (E.D. Pa. 1972); *Carson v. Vance Trucking Lines, Inc.*, 245 F. Supp. 13 (W.D. S.C. 1965); *Baksay v. Rensellear Polytech Institute*, 281 F. Supp. 1007 (S.D. N.Y. 1968). *Cf. Richards v. Upjohn Company*, 406 F. Supp. 405 (E.D. Mich. 1976).[3]

Had the Court below adopted the holdings of the above cases construing Section 1391(c) and applied those holdings

[3]Those few cases which suggest a contrary interpretation are easily distinguishable, since they confuse the independent "state of incorporation" and "doing business" bases for venue under Section 1391(c) and effectively read the former ground out of the statute.

to Section 1400(b), a just and fair result would have been obtained as well as a harmonious interpretation of similar language in two federal venue statutes. However, the Lower Court summarily declined to consider the cases construing Section 1391(c), stating that it was prevented from doing so by the decisions of this Court in *Stonite Products Company v. Melvin Lloyd Company*, 315 U.S. 561, 86 L.Ed 1026, 62 S.Ct. 780 (1942) and *Fourco Glass Company v. Transmirra Products Corporation, supra.*[4]

However, neither *Stonite Products Company* nor *Fourco Glass Company* preclude resort to the cases decided under Section 1391(c). In *Stonite Products Company*, the Supreme Court rejected the argument that the predecessor of what is now 28 U.S.C. §1392 applied to a suit for patent infringement, rather than the predecessor of Section 1400(b). Here, however, Petitioner acknowledges that the venue issue is controlled by Section 1400(b) and not Section 1391(c), but submits that in the case of a corporation the language of 1400(b) "where a defendant resides" should be construed consistently with Section 1391(c).

Likewise, this Court's decision in *Fourco Glass Company* is inapposite here.[5] In the instant case, Petitioner does not claim that venue is proper over Respondent in the Western District of Pennsylvania merely because Respondent is doing business in that District. Rather, Petitioner asserts that venue is proper in the Western District of Pennsylvania because Respondent is a Pennsylvania corporation and thus is present in all parts of the state and not

[4]The Court also relied upon *Hydro-Clear Corporation v. Aer-O-Flo Corporation, supra*. That case, as discussed *supra* at n. 2, is inapposite here.

[5]See this Court's decision in *Pure Oil Co. v. Suarez*, 384 U.S. 202, 16 L.Ed.2d 474, 86 S.Ct. 1394 (1966), limiting *Fourco Glass Company* to the particular question of statutory construction presented there.

merely in one, and only one, specific place. The question of whether a corporation is deemed to reside in each district of its multi-district state of incorporation was not considered by the Court in *Fourco Glass Company* because the defendant there was not a resident of the state where the infringement suit was brought.

By refusing to consider decisions of other federal courts construing Section 1391(c), the Court below has dictated a needless conflict in interpretations of these two federal venue statutes while apparently ignoring that this Court has recently indicated that mechanical invocation of the exclusivity of Section 1400(b) in patent infringement actions is not proper in the face of sound legal reasoning, precedent and common sense. In *Brunette Machine Works, Ltd. v. Kockum Industries, Inc., supra,* this Court reviewed the origin and purpose of 28 U.S.C. §1391(d) and held that that statute, rather than Section 1400(b), was the controlling venue provision in a suit against an alien defendant—even a suit for patent infringement. *See also Shelter-Lite, Inc. v. Reeves Brothers, Inc.*, 356 F. Supp. 189 (N.D. Ohio 1973).

The holding adopted by the Lower Court results in the illogical and unnecessary consequence that a corporate defendant under Section 1391(c) may be sued in every judicial district of its state of incorporation, while a corporate defendant under Section 1400(b) may be sued only in that one district of the defendant's state of incorporation where it has its main office, even though the alleged corporate infringer is authorized to do business throughout the state, is in fact doing business throughout the state, and is committing acts of infringement in the district in which suit is brought. Surely the Congress or this Court could not have intended to bestow such special protection upon infringers.

III. REVIEW OF THE DECISION BELOW BY THIS HONORABLE COURT IS NECESSARY TO PRESERVE UNIFORMITY IN THE INTERPRETATION OF SECTION 1400(b) AND TO CLOSE THE "GAPS" IN VENUE WHICH THAT DECISION CREATES.

While the Lower Court held that the residence of a corporation is something less than the entire state of its incorporation for purposes of Section 1400(b), that Court did not state exactly where it believed a corporation does reside for the purpose of determining venue in a patent infringement suit. The Lower Court's Memorandum opinion permits the interpretation that a corporation "resides" in any of the following districts: (a) the district in which it has its principal place of business, whether or not this district is located in the state of incorporation;[6] (b) the district or districts in the state of incorporation in which the defendant has an established place of business, whether or not defendant's principal place of business is located within that state; (c) the district in which the acts giving rise to the legal birth of the corporate existence occur, *i.e.*, the State Capitol (in the case of Pennsylvania, this would be Harrisburg, which is located in the Middle Judicial District); and/or (d) the district in the state of incorporation in which the defendant has its principal offices as designated in its articles of incorporation (this was the holding in *Hydro-Clear Corporation v. Aer-O-Flo Corporation*, 317 F. Supp. 1317 (N.D. Ohio 1970)).

Approximately 24 states of the United States encompass two or more federal judicial districts. The possibility for

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[6]Respondent in its Brief in the Court of Appeals advanced the position that a corporation resides in that district in its state of incorporation where its principal place of business is located.

conflict among the federal courts of these districts over the proper construction of Section 1400(b) is apparent.

In addition to the potential for disharmony among the federal courts, the Lower Court's decision may create "gaps" in venue under Section 1400(b). For example, assume that a federal court decides that a corporation resides only in that judicial district in its state of incorporation where its principal place of business is located, but in the case before it the alleged infringer's principal place of business is located outside its state of incorporation. Would suit be proper in any district of the state of incorporation under such circumstances, or would the "residence" basis for venue under Section 1400(b) be foreclosed completely? If no district existed in which the infringer maintained a regular and established place of business and was committing acts of infringement (as is the case herein), no district would exist in which venue was proper.

This Court has stated that in construing venue statutes it is reasonable to prefer the construction that avoids leaving a gap. *Brunette Machine Works, Ltd. v. Kockum Industries, Inc., supra,* n. 8. Contrary to this admonition, the Court below adopted an interpretation of Section 1400(b) which is rife with potential for conflict among the federal courts and may result in creating gaps in venue in patent infringement actions. For these reasons, this Court should review the decision of the Lower Court.

IV. REVIEW OF THE DECISION BELOW BY THIS HONORABLE COURT IS NECESSARY BECAUSE THAT DECISION IMPROPERLY PREJUDICES THE PATENT OWNER IN PROTECTING THE RIGHTS CONFERRED UPON HIM BY FEDERAL LEGISLATION.

This Court has recognized that changes in the general venue law since 1948 have left the patent venue statute far behind, in the sense that it is now more restrictive than the other venue statutes. See *Brunette Machine Works, Ltd. v. Kockum Industries, Inc., supra,* n. 13. The Lower Court's decision increases this disparity and provides a windfall advantage to the corporate infringer. This disparity is evident in the context of the present suit. Here, even though Petitioner does not maintain a place of business in eastern Pennsylvania, Respondent has commenced a declaratory judgment action in that Judicial District to have Petitioner's patent declared invalid! There is no sound basis in law or logic for the Lower Court's ruling that venue is proper over Respondent herein only in the Eastern District of Pennsylvania. Respondent is doing business in the Western District of Pennsylvania, its customers who are using the infringing device are located in the Western District, the inventor resides in the Western District and Petitioner's principal place of business, including its manufacturing facilities and the specialized machinery necessary to perform tests on the accused device, are located in the Western District. No sound reason exists to require Petitioner to bring suit in a district which is not only extremely inconvenient for Petitioner but which has little, if any, relationship to the acts of infringement or the convenience of the potential witnesses. Petitioner submits that Section 1400(b) should be construed in a manner which would facilitate, rather than hinder, the protection of rights

conferred upon a patent owner by Congress through the federal patent laws.

A disparity already exists under Section 1400(b) in favor of the infringer insofar as the infringer's declaratory judgment action against the patent owner is governed by Section 1391(c), a more liberal venue provision, while the infringement action is controlled by the more restrictive Section 1400(b). The Lower Court's decision grants a corporate infringer an even greater unfair advantage over the patent owner.

The prejudice caused patent holders by the overly restrictive interpretation placed on Section 1400(b) has caused concern among lawyers generally and the patent bar in particular. Recently, the American Bar Association, at its Mid-Year Meeting, adopted a resolution favoring an amendment to Section 1400(b) which would provide that a corporate infringer could be sued in any district in which it is licensed to do business or is doing business, as well as in that district in which it is incorporated.[7] While the proposed amendment to Section 1400(b) still would not resolve the question of whether a defendant is amenable to suit in any of the districts of its state of incorporation, the resolution does indicate a growing dissatisfaction with the restrictive application of the patent venue statute.

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[7]As reported in 317 P.T.C.J. A-2 (2/24/77), the text of the resolution reads:

> "BE IT RESOLVED, That the American Bar Association supports amending Section 1400(b) of Title 28 of the United States Code to read as follows: 'Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business. The judicial district in which a corporation is incorporated or licensed to do business or is doing business shall be regarded as the residence of such corporation for the purposes of this section.'"

The decision below adds to the confusion surrounding Section 1400(b) and will aggravate the unfairness to patent owners which currently exists and which the American Bar Association has condemned. The decision of the Lower Court is not only inconsistent with the policies of the federal patent laws and with decisions of other federal courts and prejudicial to the rights of patent holders, but results in a waste of judicial resources and increased expense to the parties.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment Order of the Third Circuit.

Respectfully submitted,

RAYMOND G. HASLEY
Ninth Floor, Oliver Building
Pittsburgh, Pennsylvania 15222
Counsel for Petitioner,
A. Stucki Company

Of Counsel:

JOHN H. RIORDAN, JR.
and
ROSE, SCHMIDT AND DIXON
Ninth Floor, Oliver Building
Pittsburgh, Pennsylvania 15222

United States Court of Appeals
For The Third Circuit

No. 76-1414

A. STUCKI COMPANY, a corporation,
Appellant

v.

RAILROAD DYNAMICS, INC., a corporation

D.C. Civil No. 75-482

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Submitted Under Rule 12(6) November 29, 1976 Before
ROSENN, KALODNER, and GARTH, Circuit Judges

JUDGMENT ORDER
(filed December 7, 1976)

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/s/ MAX ROSENN
Circuit Judge

Attest:

/s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

Dated: December 7, 1976

In the United States District Court
For the Western District of Pennsylvania

A. STUCKI COMPANY,
a corporation,
Plaintiff

v.

RAILROAD DYNAMICS, INC.,
a corporation,
Defendant

Civil Action
75-482

MEMORANDUM

(filed February 19, 1976 in the District Court.)

This patent infringement suit is again before the Court on defendant's motion to dismiss for improper venue pursuant to Fed. R. Civ. P. 12(b)(3). Earlier we deferred ruling on the motion and permitted plaintiff to seek discovery pertinent to the venue question. That having been done the Court finds that plaintiff is incorporated under the laws of Pennsylvania with its principal office in Pittsburgh. The defendant is also a Pennsylvania corporation with its principal place of business in Newton Square which is not located within this judicial district. The record reflects that defendant may be committing the alleged acts of infringement within the Western District of Pennsylvania[1] however it is undisputed that defendant has no place of business within this judicial district.

The sole question presented is whether venue properly lies within this judicial district. Since we conclude that it does not the defendant's motion will be granted and the action dismissed. *See* 28 U.S.C. §1406(a).[2]

[1]*See* Gallagher and Youngdahl affidavits submitted by stipulation.

[2]At oral argument counsel for plaintiff specifically requested dismissal in the event of an unfavorable decision.

Venue, for purposes of patent infringement suits, is to be exclusively governed by 28 U.S.C. §1400(b). *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957). The statute provides:

> Any civil action for patent infringement may be brought in the judicial district where the defendant resides, *or* where the defendant has committed acts of infringement *and* has a regular and established place of business. (Emphasis added.)

Since §1400(b) reads in the disjunctive plaintiff need only meet either of the above requirements to lay proper venue. The discovery engaged by plaintiff, while showing that defendant sells the alleged infringing device to customers located in this judicial district, does not reveal that defendant "... has a regular and established place of business" in this district. Accordingly venue cannot be properly based on that provision of the statute.

With regard to the first test plaintiff contends that venue is proper because defendant resides in this judicial district. The fundamental flaw in this contention is that it presupposes that the residence of a corporation, in the context of §1400(b), is its state of incorporation. Thus, the argument extends that defendant resides in all three of Pennsylvania's federal judicial districts. The Court does not agree.

Plaintiff has cited no meaningful authority for the underlying premise of its position. All the cases we are directed to which support the thesis that the state of incorporation controls, for venue purposes, the definition of residence deal with 28 U.S.C. §1391(c), the general venue statute. Because §1391(c) is not applicable to the case at bar, *see Fourco Glass Co. v. Transmirra Products Corp., supra*, we shall disregard those authorities.

We believe plaintiff's argument to be subsumed and rejected by *Stonite Products Co. v. Melvin Lloyd Co.*, 315

U.S. 561 (1942). This is a patent infringement case whereby Stonite, an "inhabitant" of the Eastern District of Pennsylvania, was sued in the Western District of this state. Stonite was without a regular place of business in the forum district. After deciding that the patent venue statute, then §48 of the Judicial Code, 28 U.S.C. §109, was to exclusively govern the propriety of where suit could be brought, the Supreme Court, in reversing the Third Circuit Court of Appeals, held that venue was not proper in the Western District of Pennsylvania. In rejecting the respondent's argument that §48 should be supplemented by another venue statute the Court necessarily read §48 [now §1400(b)] restrictively. That is, Stonite was considered to be solely an inhabitant (or resident) of the Eastern District of Pennsylvania—not the entire state—for venue purposes. *See Hydro-Clear Corp. v. Aer-O-Flo Corp.*, 317 F. Supp. 1317 (N.D. Ohio 1970).

We of course realize that §1400(b)'s predecessor, §48, is not the exact statute which controls the issue *sub judice*, however we are convinced that the patent venue statute, in being revised and recodified in 1948, did not undergo any substantive change. *See generally, Fourco Glass, supra*, at pp. 224-28.

We must therefore conclude that the defendant, having its residence only in the Eastern District of Pennsylvania, and not having a regular and established place of business in the Western District of Pennsylvania, cannot be sued in this forum under §1400(b).

Likewise, we believe plaintiff's additional argument that the "save harmless" clause found in defendant's purchase orders constitutes an implied waiver of venue to be without merit. *See Sterling Manufacturing Co. v. Radio Shack*, 364 F. Supp. 1068 (N.D. Ohio 1973).

An appropriate order shall be issued.

In the United States District Court
For the Western District of Pennsylvania

A. STUCKI COMPANY,
a corporation,
Plaintiff

v.

RAILROAD DYNAMICS, INC.,
a corporation,
Defendant

Civil Action No. 75-482

ORDER OF COURT

(filed February 19, 1976 in the District Court.)

AND Now, to-wit, this 19 day of February, 1976, it is hereby ORDERED, pursuant to 28 U.S.C. §1406(a), that the above-captioned case be dismissed.

/s/ JOHN L. MILLER,
United States District Judge.

cc: Raymond G. Hasley, Esq.,
Rose, Schmidt and Dixon,
919 Oliver Building,
Pittsburgh, Pennsylvania 15222.

Michael W. Cook, Esq.,
Metz, Cook, Hanna & Kelly,
3600 Grant Building,
Pittsburgh, Pennsylvania 15219.

Louis V. Schiavo, Esq.,
1644 Fidelity Building,
123 South Broad Street,
Philadelphia, Pennsylvania 19109.